In The

Supreme Court of the United States

October Term 1975

No. 75-1864

LLOYD GARMISE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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STATEMENT

Petitioner, Lloyd Garmise, petitions this Court for a writ of certiorari to review a judgment and order of the District Court of Appeal of the Third District of Florida rendered the 8th day of April, 1975, which in turn had affirmed the judgment of the Circuit Court of the Eleventh Judicial Circuit of Florida, convicting him of the crime of murder first degree, after trial before Whitworth, J., and a jury. On December 16, 1975, the Supreme Court of Florida dismissed the appeal on motion of the prosecution. On February 10, 1976, the Supreme Court of Florida denied an application for reconsideration and/or certiorari.

Mr. Justice Lewis P. Powell, Jr., an Associate Justice of this Court, granted a motion by the petition to file the petition for certiorari herein up to and including the 28th day of June, 1976. A copy of the aforesaid order of Justice Powell is annexed hereto and made a part hereof.

The petitioner herein has been sentenced to a term of life imprisonment, instead of death, in accordance with the recommendation of the jury.

OPINION BELOW

The opinion of the District Court of Appeal of Florida for the Third District is annexed hereto and made a part hereof. Only a decision was rendered by the Supreme Court of the State of Florida and that, too, is annexed.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The Supreme Court of the State of Florida denied a motion for rehearing on the 10th day of February, 1976, and Mr. Justice Lewis Powell, Jr. of this Court granted a motion to permit the petitioner herein to file his petition for certiorari up to and including the 28th day of June, 1976.

QUESTIONS PRESENTED

1. Whether petitioner was denied the equal protection of the laws under the Fourteenth Amendment of the United States Constitution, by being deprived of an appeal as of right, to the Supreme Court of the State of Florida?

2. Whether petitioner received a fair trial in accordance with the concept of due process of law, in view of the rulings of the trial court with respect to the admission of evidence?

3. Whether there was sufficient evidence in accordance with due process to have warranted a verdict of murder in any degree (Fifth and Fourteenth Amendments, United States Constitution)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Sixth and Fourteenth Amendments of the United States Constitution are involved, as is the Constitution of the State of Florida, Article V, Section III b2.

ESSENTIAL FACTS

The petitioner herein, at the time of the crime, was a youngster of 21 years of age who was scheduled to graduate the University of Miami a few weeks after the incident herein occurred. He had never previously been in conflict with the law, and has no history of assaultive or aggressive conduct.

The deceased, Mark Jones, another student at the University, had embarked upon a calculated campaign to threaten and harass the petitioner in an effort to force him to evacuate the room he rented in the house which they shared in Miami wherein Jones also rented a room. Jones, as a matter of fact, was seeking to evade legal dispossess process, and there is no doubt that great pressure, including threats and harassment, were directed at Garmise.

There were altercations between Garmise and Jones prior to the incident that culminated in Jones' demise. For example, at the inquest in the Magistrate's Division (Inquest Minutes, 36, 37) Officer Carey testified that a roommate, Richard Karel had told him of Jones' plans, relating:

> "Upon interviewing Richard Karel, he stated that Mark had been upset with Lloyd and wanted him

> to leave the residence. And, instead of having Lloyd Garmise evicted, he decided that he would attempt to harass and antagonize him, in any way he saw fit, short of bodily harm, in order to get him aggravated *enough to get him to remove* himself from the house, rather than going through the procedure of eviction.
>
> The matter of the plate was a way to antagonize him, because the majority of the property in the house belonged to Mark, such as utensils."

Officer Ronald Carey, Sgt. James Duckworth, and Dr. Charles Garrett, all of whom testified at the inquest, admitted that *there was no evidence,* including the tapes and statements, *which contradicted the petitioner's version of the events.* Dr. Garrett said the *medical findings were consistent with Garmise's version* of what had occurred (Inquest Minutes, Carey, 38, 39; Duckworth, 43, 44; and Garrett, 53).

What is quite significant is that the *magistrate* (Judge Hickey), who conducted the inquest specifically *ruled out the possibility of murder first degree,* and held the petitioner on a charge of *murder second degree as the highest charge* (Inquest Minutes, 77).

It is also significant that the knife described by petitioner was found under the right leg of the deceased. Since the deceased was found in his own room, with the door closed and leaning up against the door so it had to be forced open, it is impossible that anyone except Jones could have put the knife there. It is only possible that Jones had the knife as Garmise said, ran to his own room after being shot, and locked his door behind him, propping himself against the door. This fact corroborates, unmistakably, Garmise's version of what occurred.

Additionally, it must be borne in mind that it was Garmise who called the police and who turned over to them all of the

evidence later used against him. He did not attempt to flee or to evade questioning.

So far as the case itself is concerned, the court that tried it, did so without appreciating Florida's pronouncements on circumstantial evidence and acceptance of uncontradicted evidence of the petitioner's version of the events. The trial judge *incorrectly charged on circumstantial evidence.* He said, *inter alia,* that if the

> ". . . circumstances were susceptible of two equally reasonable constructions, one indicating guilt and the other innocence, you must accept that construction indicating innocence" (T728).

This is *not* a correct statement of the law. The rule as to circumstantial evidence is that circumstantial evidence may not be used unless the circumstances relied upon exclude to a moral certainty every other reasonable hypothesis but that of guilt. Saying that "equally reasonable constructions" is the criterion is therefore clearly inconsistent with Flordia Appellate Courts' pronouncements in many cases as will be illustrated *infra.*

Additionally, the tape recordings were not "evidence" in the usual sense, since they were not sworn statements, and could not be cross-examined. The only living participant to the tape made at the time of the shooting was Garmise and his testimony is unrefuted that it was not murder.[1]

> "Q. Were you able, yourself, either through oral statement of the Defendant or the *tape* or any physical evidence, to disprove the assault that Lloyd told you happened, that Mark had come at him with a knife? A. [Carey] No. I was not . . ." (Inquest Minutes, 38, 39).

---

1. Another tape of an argument with Jones was not played for the jury.

* * *

"Q. Have you found any statements, with regard to premeditation, that you can present to the Court, that would indicate that Lloyd Garmise intended to set the shooting up the way it happened? A. [Duckworth] No, I was not.

Q. Did you find any statements afterwards that would negate the assault that Lloyd Garmise told you happened? A. [Duckworth] No, I did not . . ." (Inquest Minutes 43, 44).

Dr. Garrett testified that the officers told him what Garmise said and that he heard the tape (Inquest Minutes, 52).

"Q. Would your findings be consistent with the version that was told to you by Lloyd Garmise? A. [Dr. Garrett] Yes" (Inquest Minutes, 53).

Although there are more errors, we ask that the Court also recognize that the evidence reveals that the deceased brandished a deadly weapon (butcher knife) in the room or at the threshold thereof occupied by the petitioner and that there had been a calculated campaign by Jones to harass and torment Garmise.

Finally, a series of highly inflammatory pictures of the deceased were shown to the jury, ostensibly to reveal he was barechested, despite the concession of the defense that they admitted this was so. Whether Jones was barechested or not was irrelevant in any event, and obviously, the prosecutor sought only to inflame the talismen.

Petitioner had even sought help from the police the prior month (September 9, 1974) when Jones had threatened him with violence. It was undisputed further that Garmise was "alone"

and unallied with any other member of the household wherein he resided. Garmise testified that he was terrified and frightened.

The most significant aspect of the case that we request this Court to recognize is that there were no witnesses to the shooting other than the petitioner and of course the deceased. The tape recording which was coincidentally made because the petitioner activated it at the time of the incident is not contradictory to Garmise's account of the events (see Inquest Minutes, Carey, 38, 39; Garrett, 53; Duckworth, 43, 44).

Thus, the version of the shooting as detailed by petitioner in his recounts of the events is uncontradicted. The circumstantial inferences sought to be drawn by the prosecutor do *not* eliminate to a moral certainty every other reasonable hypothesis but that of guilt.

Richard Karel testified for the State at the trial and related the fact that there had been a series of altercations among the deceased, himself, and petitioner during several weeks preceding the shooting. Karel's testimony must be viewed in the light of the fact that he admitted that he had been Garmise's worst enemy; that he thought petitioner to be a coward and that Karel was otherwise motivated to make petitioner appear at the scene and could give no evidence to contradict petitioner's version of the events.

There was no one who could have contradicted petitioner's version of the events which led up to the killing of the deceased. The State necessarily had to rely upon circumstantial inferences and the trial court applied an improper standard with respect to the adduction of such evidence.

Officer Stabill, whose testimony was really essential to the case, was apparently on his honeymoon at the time of the trial. Defendant-petitioner's counsel, for some unknown reason, did not insist upon his production as a witness, although this

severely prejudiced Garmise. Accordingly, the testimony of Stabill does not appear in the trial.

Another officer, Vickie Vallen (T290-292) was permitted to introduce Stabill's report, which she herself had not signed, and, consequently it was a completely hearsay version of the events without an opportunity to cross-examine.

The deceased was found in his own room, not the petitioner's, with the door locked behind him and propped up against it so that his body had to be pushed away when the door was forced open. There was a butcher knife, described by petitioner, under the deceased's right leg, thereby corroborating Garmise's statement that the deceased had a knife. Because of the fact that the deceased was found in his own room propped up against the door, it is obvious that nobody could have put the knife there and accordingly he must have had the knife at the time that he menaced Garmise.

Ironically, Judge Hickey, who conducted the inquest, ruled that the highest degree for which Garmise could be held was murder second degree. Notwithstanding this fact, a murder first degree indictment was returned.

For some strange reason, the State maintained that it was important to show that the deceased was shirtless at the time of the shooting. This fact was conceded by the petitioner. One non-inflammatory photo could have corroborated this fact, if it needed corroboration, but the State insisted on putting into evidence three additional, cumulative photos which were highly inflammatory since they showed blood and gore and bullet holes in the deceased's body. Over vehement objection, and without cogent reason, the court permitted all four photos into evidence, thus irreparably prejudicing the petitioner (T220-234, T642-648; App. 21-24).

Going into the facts in somewhat greater detail for the benefit of this Court, we think the following may be of help in understanding the events on the day of the homicide.

The house located at 5760 S.W. 60th Street, in Miami, was composed of two bedrooms, a Florida room, a sort of kitchen, and a dining room area (T162). Residing on the premises on October 16, 1973, was the petitioner, Richard Karel, the deceased, Mark Jones, and Doug Hubbard (T156-157). The room that the petitioner occupied was makeshift in that it was partitioned off with wood and cardboard, covered with cloth. It was a fairly small room (T163). In the room that the petitioner occupied, there was a waterbed that took up most of the space.

Entrance to the room was through double doors. There was approximately three feet remaining between the waterbed and the wall. From the head of the bed through the doors, one would only have to walk a very small distance, or a total amount of approximately five or six feet. Upon entering the room, one observes a narrow space between the bed and the wall, no more than three or four feet from the head of the bed. There was also a chest and some cinderblocks which supported a stereo and two speakers. There was a card table and a chair as well (T162-168, T665, T668, T671, T674; App. 14, 15, 16, 17).

There had been altercations among the petitioner and occupants of the house prior to October 16, 1973 (T155).

The petitioner, Lloyd Garmise, testified that he was twenty-one years of age and was a graduating senior at the University of Miami (T384). He moved into the house at 5760 S.W. 60th Street, on the first occasion, in November of 1972, at the request of the deceased, Mark Jones (T385). The petitioner continued to reside in the house until asked to leave by the occupants at that time (T385-386).

The petitioner returned to school in June of 1973, and resumed living at 5760 S.W. 60th Street (T389), and furnished the room with a waterbed, a stereo, and a table. He subsequently purchased a tape recorder (T391).

With the waterbed in the room, there was not much space to move around. Between the bed and the wall, there was approximately a foot or two (T392). The only exit and entrance to the room was by french doors. One door was continuously closed, and the other door opened into the room (T393). Approximately one month after he moved in there arose differences of opinion with the other occupants of the house, and in fact, Garmise was attacked by Richard Karel approximately July 15 (T393-394).

The petitioner was also threatened by the deceased, Mark Jones, who stated he was going to kill him (T396-397, T398). Thereafter, the petitioner stated that he was *deathly afraid of his life and was trembling with fear* (T399). As a result of these threats, the petitioner went to the police on approximately September 9th, and reported the threat (T402).

Subsequently, there was another altercation with Mark Jones, when the deceased came to the petitioner's room. He went to the kitchen, got a butcher knife and kept trying to open the petitioner's door (T404-405). Later, there were two or three other arguments with Mark Jones, where the deceased threatened the petitioner, causing the petitioner to have fear for his life (T406-407). After these arguments, the petitioner purchased a gun as he felt he needed something to protect himself, since the deceased threatened to kill him (T407). The gun was kept in the cinderblocks in the petitioner's room, loaded (T408).

On October 16, 1973, the petitioner returned home approximately 4:30 in the afternoon. The only one in the house at the time was Roger Andrews who lived in a van on the front lawn. Roger Andrews left at approximately 5:00 p.m. and shortly thereafter the deceased Mark Jones came in. The petitioner remained in his room with his door wide open. Mark Jones went to his own room and at that time the petitioner put on his tape recorder, which he utilized for his studies at the University of Miami.

Mark Jones came to the petitioner's door and questioned the petitioner about having some plates in his room. The deceased left the door and the petitioner heard him go into the kitchen. Shortly thereafter, the deceased came back to the petitioner's door brandishing a knife in full view. Mark Jones advanced into the room toward the petitioner (subsequently on cross-examination the petitioner testified that the knife was pointing toward his heart (T439)). At that time, the deceased was approximately two feet from the petitioner who was standing near the cinderblocks.

The petitioner grabbed for the gun, as a reflex action. He was wild with fear for his life at that time (T454). Garmise shot at the deceased, but does not remember how many times he fired at him or whether he even hit him. The tape recorder was in an "on" position. Garmise did not know whether he hit the deceased, but he heard the deceased run to his room, and heard the door close. The petitioner went to the deceased's room, the door of which was closed, and then called the police (T408-419).

The police responded in approximately 15 minutes, and subsequently petitioner was advised of his constitutional rights. The petitioner then wrote a statement for the police (T684-685; App. 18). (The shooting occurred approximately five to five-thirty [5:00 to 5:30] p.m. and the police remained on the scene until 11:30 or 12:00 (T422)).

The petitioner then called his father in New York, and told him that he had given the police a written statement of what had happened and the father learning from him that he did not have a copy for himself, advised him to write another one out so that he could have one for himself, for his own recollection. With that advice, Garmise did write out another statement (T423, T695; App. 19). One statement the petitioner threw away, and wrote another which he gave to his lawyer (T424). The petitioner was not arrested. Following an inquest which did not result in

the petitioner's arrest, he was permitted to return to New York where his family and he resided.

Thereafter, Garmise was advised that he was indicted for murder in the first degree, and he voluntarily returned to Miami to face the charges. Bond was set, and after furnishing it he returned to New York. When he was requested to be in court in Miami, he was present (T426-427).

During cross examination, petitioner reiterated what had been revealed on direct examination, and in answer to questions on cross, repeated that the knife wielded by the deceased was pointed at his heart and that the deceased came within two feet of the petitioner. Garmise again explained how he grabbed for his gun upon seeing Jones advancing with a knife (T439-440). The petitioner further explained that he took the gun out of the holster, and stood there, and that this occurred in a brief time (T445).

Officer Vickie Vallen, received the call to proceed to the house where the shooting occurred, and arrived at 5:16 p.m. together with her partner, Officer Stabill. When they arrived, the petitioner was standing in the doorway of the house, and they ascertained for him where the victim was, and where the weapon was located. Garmise was advised to stay outside the house by the police (T252-254).

Upon proceeding to the deceased's room, they found the door was closed. They attempted to open the door but could not do so as it was locked. Thereupon, Officer Stabill kicked the door in but could not open the door completely because the victim's feet were on the door.

The officers testified that the victim was not wearing a shirt and he was barechested (T256). The petitioner was notified of his constitutional rights by the police officers and voluntarily gave them a verbal statement. He also advised the police that what had occurred was on a tape recording (T258-262).

Thereafter, James Carr, police technician, with the Dade County Public Safety Department, testified on behalf of the State as to his function on the scene. The State showed Officer Carr a photograph and he stated that this was a true representation of where he found the knife which was under the right foot of the deceased. Officer Carr took many black and white photographs of the scene together with color photographs (T305) and further testified that he removed the knife from beneath the victim's feet (T312). A photograph of the knife was introduced into evidence (T672; App. 20).

The State offered into evidence a series of gory color photographs depicting the victim on the scene which proffer was to show that the deceased was shirtless. The defense stipulated that the deceased was shirtless.[2] The defense made objection to the series of photographs on the grounds that they were not relevant; they were highly prejudicial and inflammatory and that they would have no relevancy in that the defense stipulated to this fact.

Further, the defense conceded that there was one photograph that would not be too inflammatory, and would show that the decedent did not have a shirt on. The court subsequently admitted the four photographs over the objection of the defense.

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2. Officer Vallen so testified as well.

REASONS FOR GRANTING THE WRIT

I.

The petitioner was denied equal protection of the laws under the Fourteenth Amendment of the United States Constitution by the action of the Supreme Court of the State of Florida in dismissing his appeal to that court after briefs and records were filed, served and docketed. Since Garmise was given a life sentence, he was entitled to an appeal to the Supreme Court as of right.

The Constitution of the State of Florida, Article V, Section III b 2, entitled "Supreme Court," reads as follows:

> "Jurisdiction: The Supreme Court; (2) when provided by general law, shall hear appeals and final judgments and orders of trial courts imposing life imprisonment. . . ."

The defendant-petitioner herein was found guilty of murder first degree and escaped the death penalty only by virtue of the recommendation of the jury. He was sentenced to life imprisonment. Accordingly, it is the position of the petitioner herein that he was entitled to an appeal to the State Supreme Court as of right, and not as a matter of discretion or certiorari.

From the foregoing quotation from the Constitution of the State of Florida, it is obvious, we maintain, that Garmise was entitled to an appeal. For some reason, the State declined to hear the appeal, but dismissed, apparently on the ground that he was not entitled to an appeal as of right. We have attached the orders of the Supreme Court of Florida and they are not illuminating on this subject.

It is manifest that a State may not discriminate in an invidious or arbitrary manner between litigants. While it may well be that a State can deny appellate review altogether, where

it is in fact granted to any litigant however, it must be granted on an equal basis to all similarly situated persons. In other words, where federal or State governments provide for appeals, discriminatory denial of a statutory constitutional right of appeal violates the equal protection clause of the Fourteenth Amendment or the due process clause of the Fifth Amendment, in the case of the federal government. *(Cochran v. Kansas,* 316 U.S. 255 (1942); *Dowd v. United States,* 340 U.S. 206, 19 A.L.R. 2d 784).

It should be noted that there is no federal constitutional right to State appellate review of State criminal convictions. *(Estelle v. Dorrough,* 43 L. Ed. 2d 377, *reh. denied,* 43 L. Ed. 2d 790, *on remand,* 512 F.2d 1061 (5 Cir. 1975)). It is not violative of due process to dismiss an appeal in a State court because the prisoner has escaped. *(Molinaro v. New Jersey,* 396 U.S. 365). This, however, is not similar to the case at bar since there was no escape. These cases are merely mentioned so as to distinguish them from the case at bar.

See also, *Griffin v. Illinois,* 351 U.S. 12.

What the Supreme Court of Florida has done is to deny an essential right of appeal to the petitioner herein and has given no apparent reason therefor.

A motion for reconsideration and rehearing, and in the alternative a motion for a writ of certiorari, was filed with the State of Florida Supreme Court, but to no avail.

It appears on its face that the Supreme Court of Florida has made an impermissible classification since the petitioner herein has been denied what apparently any other person would be entitled to. Since Garmise was convicted of murder first degree and was sentenced to life imprisonment, it appears obvious from Article V, Section III b 2, that he is entitled to an appeal as of right. The constitutional provision clearly says that the Supreme

Court *"shall" hear appeals* and refers specifically to those situations where the trial courts have imposed "life imprisonment."

The Supreme Court of the United States has said:

> "There is a point beyond which the state cannot go without violating the Equal Protection Clause. The State must proceed with a rational basis and may not resort to a classification that is palpably arbitrary." *(Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522).

Perhaps the reason for the action of the Supreme Court was that Garmise was not a permanent resident of the State of Florida, although that is not specifically conceded in the record. His family did live and does still live in the State of New York. We cannot believe that there is any basis for such an assumption, but even if that were the case, obviously the discrimination involved would be so patent as to shock the conscience of any court.

The Supreme Court, for example, considered a case rather recently where an invidious discrimination was made by denying illegitimate children the right to maintain a suit for the wrongful death of their mothers, but permitting such actions by legitimate children. *(Levy v. Louisiana,* 391 U.S. 68).

See also, *Glona v. American Guaranty & Liability Ins. Co.,* 391 U.S. 73.

While the defendant-petitioner herein is not a foreign corporation, he is a "foreigner" in the sense that he resides in New York, but the Supreme Court has stated that in the case of a foreign person, which happened to be a corporation, once that corporation enters the State, it must be treated equally and cannot be discriminated against solely because it is a foreigner. *(Whyy, Inc. v. Glassboro,* 393 U.S. 117).

The Supreme Court of the United States has indicated that in equal protection cases it will ask the following question: "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" It added that "When state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny." *(Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164).

See also, *Gomez v. Perez,* 409 U.S. 535, and *New Jersey Welfare Rights Organization v. Cahill,* 411 U.S. 619.

See also, *United States Department of Agriculture v. Murry,* 413 U.S. 508.

If the judges of the Supreme Court of Florida for some reason arrogated to themselves a determination that they would not hear the case, that too would be an invidious discrimination. Even though a State statute or local ordinance or constitutional provision for that matter is fair on its face, invidiously discriminatory action thereunder by public officials, be they judges or anyone else, will be violative of equal protection of the laws. In the most famous case, where San Francisco officials would not permit Chinese to use their property for laundries while permitting others similarly situated to make such use, the United States Supreme Court voided such application of the ordinance. Said the Supreme Court:

> "Though the law itself be fair on its face, and impartial in appliance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." *(Yick Wo v. Hopkins,* 118 U.S. 356).

And when a law is non-discriminatory on its face, it will still be struck down when grossly discriminatory in its operation. *(Guinn v. United States,* 238 U.S. 347; *Griffin v. Illinois,* 351 U.S. 12).

On a number of occasions the United States Supreme Court has utilized the due process clause of the Fourteenth Amendment, rather than the companion equal protection clause, to insure equality of treatment by the States. For example, in 1950 the Court appears to have chosen the due process clause to condemn trial of a Negro after indictment by a grand jury from which members of his race had been systematically or arbitrarily excluded. *(Cassell v. Texas,* 339 U.S. 282). Again, in cases involving the systematic exclusion of members of the accused's race from the trial jury, the Supreme Court seemingly prefers to invalidate the imposed inequality through the use of the due process clause. *(Shepherd v. Florida,* 341 U.S. 50). Historical and traditional concern of the due process clause with procedural fairness probably accounts for these cases.

In substantive matters, too, the Supreme Court has at times used the due process clause of the Fourteenth Amendment to invalidate discriminations. As early as 1896 Justice Harlan in his famous dissent in *Plessy v. Ferguson,* stated that segregation on a racial basis amounted to an interference with personal liberty without due process of law. *(Plessy v. Ferguson,* 163 U.S. 537). Twenty years later, when a colored man was denied his equal right to purchase land because of a restrictive municipal ordinance, the legislation was invalidated by the Supreme Court because the seller's liberty was denied without due process of law. *(Buchanan v. Warley,* 245 U.S. 60; note also, *Harmon v. Tyler,* 273 U.S. 668; *Richmond v. Deans,* 281 U.S. 704 (1930)). Similarly, any State statute to the contrary would have to yield to the Constitution.

In 1923 the United States Supreme Court utilized the due process clause to guarantee teachers of German equality of right with those teaching French and other languages. *(Meyer v.*

Nebraska, 262 U.S. 390). Two years later, parochial and private schools were accorded equality of opportunity with public schools in their right to teach children. *(Pierce v. Society of Sisters,* 268 U.S. 510).

In 1927 a distributor of leftist literature was held entitled, under the due process clause, to an equal opportunity with more conservative publishers to publish his wares and ideas. *(Fiske v. Kansas,* 274 U.S. 380). The following year inequality in the permitted use of land under a zoning ordinance was invalidated by the Court under the due process clause. *(Washington ex rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116). The Supreme Court, like the State courts, is inclined to use the due process clause in invalidating inequalities under zoning ordinances. *(Nectow v. Cambridge,* 277 U.S. 183; Ribble, *The Due Process Clause as a Limitation on Municipal Discretion in Zoning Legislation,* 16 Va. L. Rev. 689 (1930)).

Frequently, governmental discriminations against non-residents are invalidated by the courts under due process of law in the Fourteenth Amendment and comparable clauses in the State Constitutions. *(Southern Lines Linen Supply Co. v. Corbin,* 272 Ky. 787, 115 S.W. 2d 321; *Woolf v. Fuller,* 87 N.H. 64, 174 A. 193, 94 A.L.R. 1067 (1934); Paulsen, *The Persistence of Substantive Due Process in the States,* 34 Minn. L. Rev. 91 (1950); Dykstra, *Legislative Favoritism Before the Courts,* 27 Ind. L.J. 38, 53 (1951)).

In sum therefore, it is maintained that since there is no reason whatsoever advanced for the dismissal of the appeal herein, coupled with the fact that as we interpret the constitutional provision which we have set forth, that anyone sentenced to life imprisonment is entitled to an appeal to the Florida Supreme Court, we maintain that this Court should grant certiorari and then direct that the Supreme Court of Florida hear the appeal.

II.

The evidence adduced at trial was insufficient as a matter of law to have warranted conviction. Petitioner maintains therefore that due process of law was violated because there was no basis in the facts justifying conviction.

Due process of law does not permit the government to convict a defendant through the use of an irrational presumption *(Manley v. Georgia,* 279 U.S. 1).

A presumption is irrational when the inference of the ultimate fact from the proof fact is arbitrary or lacking connection between the two in common experience. The leading case of *Tot v. United States,* 319 U.S. 463, 467, 468, the Supreme Court explained:

> "A statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience."

In the case at bar there was only one version of what occurred at the scene of the homicide, namely that of Garmise. The tape which was introduced into evidence at the trial had been supplied by Garmise himself. That tape we maintain did not contradict what occurred and in any event it had no independent testimonial value. It was merely past recollection recorded and could only be used as a *aide memoire* to refresh the recollection of Garmise himself. It certainly was not a sworn witness and it did not constitute evidence as such.

The petitioner, Lloyd Garmise, elected to testify in his own behalf and also gave statements and tapes to the authorities at the time of his meeting them in his home following the tragic event.

Both the trial and inquest minutes reveal that there is a total dearth of any material testimony which contradicts Garmise's account of the events on the date of the incident.

Garmise, a 21 year old student, with no history of criminal or aggressive conduct, was made the object of a calculated design by the victim, Mark Jones, to seek to force Garmise to move. To this end, Karel, another roomer, told the police that Jones had embarked upon a plan of harassing and threatening the petitioner in various ways to force him to move (Inquest Minutes, 36-37). Even at the trial, Karel admitted that he and the other roomers wanted Garmise out of the house and that they disliked him. Karel said Garmise was a coward and that he hated petitioner.

Garmise testified that he was in terror and had complained to the police on the prior September 9th about threats against himself. Upon reaching the age of 21 in October, Garmise purchased a gun. There is no evidence that this fact, legal in itself, was done with any design to use it to kill Jones or anyone else. The testimony as to the day of the shooting, in fact, is to the contrary.

A butcher knife was found under the leg of the deceased in his own room. The deceased had locked the door, and was found propped against it, so that the police had to push their way into his room. Thus, it is obvious that the knife could not have been planted under his leg. This is in addition to the fact that there is no testimony that any such thing was attempted.

The District Court of Appeal for the Third District in its *per curiam* opinion for affirmance did not even cite the case of *Mayo v. State,* 71 So. 2d 899. Yet, in its opinion, that court acknowledges that the only evidence relied upon to contradict Garmise was "mainly circumstantial."

The trial court had incorrectly attempted to charge on the subject of circumstantial evidence. The trial court ignored

petitioner's citation of the *Mayo* case as dispositive on the subject (T381-T383). Instead the trial judge charged:

> ". . . if . . . circumstances are susceptible of two *equally* reasonable constructions, one indicating guilt, and the other innocence, you must accept that construction indicating innocence" (T728).

This is not the correct instruction. The law in that State is that "every other reasonable hypothesis, but that of guilt" must be eliminated before circumstantial evidence is deemed sufficient.

Moreover, evidence which leaves one with "nothing more than suspicion" that the defendant is guilty is never enough. Thus, the Supreme Court of the State of Florida explained in *Mayo v. State, id.* at 904:

> "When circumstantial evidence is relied upon to convict a person charged with a crime, the evidence must not only be consistent with the defendant's guilt but must also be inconsistent with any reasonable hypothesis of his innocence. Head v. State, Fla. 1952, 62 So.2d 41; Bellamy v. State, 96 Fla. 808, 119 So. 137. And evidence which leaves one with *'nothing stronger than a suspicion' that the defendant committed the crime is not sufficient to sustain a conviction.* Frank v. State, 121 Fla. 53, 57, 163 So. 223, 224.
>
> Circumstantial evidence is never sufficient to support a conviction where, after there is assumed all to be proved which the evidence tends to prove, another hypothesis still may be true, because it is the actual exclusion of each other hypothesis which clothes mere circumstances with the force of proof. *Thus evidence leaving uncertain which of several hypothesis may be true,* or establishing only a probability favoring one hypothesis rather than another, *cannot be equal to proof of guilt, no matter how strong the probability may be.* Whetson v. State, 31 Fla. 240, 12 So. 661." (Emphasis ours.)

In *Willcox v. State,* App. 258 So. 2d 298 (1972), that court specifically held that a charge on circumstantial evidence using the words "equally" reasonable constructions, was incorrect. We must bear in mind that the charge herein was merely a "rote" recitation of the law, without any expatiation or explanation of the technical language used.

It is remarkable, further, that the trial judge did not marshall the evidence; did not explain that the jury must eliminate every other reasonable hypothesis, but that of guilt. Again in *Mayo,* 71 So. 2d at 903-904, the court further explained:

> "Again, in Jenkins v. State, 120 Fla. 26, 161 So. 840, we reversed a first-degree murder conviction where the defendant's version of the killing was not contradicted. There we said, 'the evidence of the premeditated design ought to be supported by something more than guess work and suspicion, especially where the account of the homicide, as given by the accused, indicates a slaying in mutual combat under circumstances not making out a case of premeditation. . . ."

It has further been held in the State that *"Probability cannot be the basis for guilt."* See, *McGough v. State,* 302 So. 2d 751 (1974) where the court, quoting *Mayo* further explained the law (*id.* at 755):

> "Where an attempt is made by the State to prove such thorough circumstantial evidence, such proof must not only be consistent with guilt but also inconsistent with any other reasonable hypothesis of innocence. Lockett v. State, Fla. App. 1972, 262 So.2d 253; Mayo v. State, 71 So.2d 899 (Fla. 1954); Masters v. State, 159 Fla. 617, 32 So.2d 276 (1947). Probability cannot be the basis for guilt."

A.

There was no legally sufficient evidence contradicting petitioner's version of what occurred. The trial court erred in refusing the petitioner's request on this score.

The defense at trial specifically asked the trial court to charge that petitioner's version of the case must be given great weight, especially where there is no evidence refuting his version (T697; App. 25).

The defense had sought a directed verdict of acquittal on the basis of the *Mayo* case, but the trial judge refused. Yet in *Mayo*, the Florida Supreme Court explained (71 So. 2d at 903):

> "A defendant's version of a homicide *cannot be ignored where there is absence of other evidence legally sufficient to contradict his explanation.* In Holton v. State, 87 Fla. 65, 67, 99 So. 244, 245, the deceased was found on the side of a road with a bullet wound in his head and a pistol lying by his side under his right hand, which pistol contained an empty shell and two loaded shells. A small cloth was lying across his body near the waistline. The defendant claimed he shot deceased in *self-defense* after being shot at by deceased.

> In reversing a conviction of second degree murder that Court stated:
>
> 'It is urged that the fact of the finding of the cloth on the body of the deceased and the fact of the wound in the back of the head tend to show that the accused was attacked from behind, and after he fell the cloth which he used as a wrap for his pistol was take: from the pistol, the body turned over, and the cloth placed upon it; *but this is mere conjecture.* The defendant's explanation was that the deceased, who was walking by the side of his mule, began the dispute, accused the defendant of stealing a whisky still, called him a liar when he denied it, and fired at him with the pistol; that the defendant replied with a shot from his shotgun, the mule whirled, jerking the deceased half around, and defendant reloaded his gun, and fired again. *If that was a true account of the transaction, we do not agree with the conclusion of the jury that it was murder in the second degree.* We think the evidence as a whole fails to support the verdict. See Small v. State, 20 Fla. 780.'" (emphasis ours.)

The evidence relied upon by the State to contradict petitioner's account is that he purchased a gun. This in itself was not an illegal act and does not eliminate a hypothesis consistent with innocence (see, *Mayo v. State, supra; Thompson v. State,* App. 276 So. 2d 218).

In *Campereale v. State,* 270 So. 2d 49, 50, the court noted that ". . . *however great the probability may be*" of guilt, it is *not enough* if every other reasonable hypothesis of innocence is not also eliminated.

Certainly, in the case at bar, there are reasonable hypotheses galore that Garmise did not commit murder first degree or homicide in any degree. There is a strong basis to believe that Garmise, having been harassed and threatened numerous times, actually felt that his life was being threatened when Jones entered the threshold of his room brandishing a butcher knife.

Richard Karel testified that threats were uttered back and forth among himself, Garmise and Jones from time to time. He admitted that Jones planned to threaten and harass Garmise seeking to make him quit his residence in their mutual home. He himself had hit and threatened Garmise.

Garmise, a young college boy, away from a protective home, without any friendly person nearby, naturally was upset, frightened and nervous.

Garmise was so frightened and upset that he went to the police on September 9, 1975. His bravado of hurling back threats when taunted and bullied, do not spell out premeditation or even criminality. This is the threadbare "evidence" relied upon by the State. We maintain that not only is it not sufficient, but that the court had no right to even submit murder first degree to the jury.

Judge Hickey in the Magistrate's Division at the inquest, eliminated that charge from consideration.

Assuming that there was evidence of criminality at all, a fact we do not concede, at the very most a manslaughter charge would have been warranted. *(Febre v. State,* 158 Fla. 853, 30 So. 2d 367). We again hasten to add, that we are advancing the foregoing only *arguendo,* and persist in our contention that since there is no meaningful contradiction of the petitioner's version that self-defense is properly established as a matter of law.

The trial court having refused the petitioner's request on consideration of his version being given great weight, coupled

with the trial judge's refusal to articulate the law on circumstantial evidence as explained in *Mayo v. State, supra,* the petitioner was deprived of a fair trial in violation of due process of law.

In essence, the State has used the irrational presumption that because Garmise committed the shooting itself that he was necessarily guilty of murder first degree. Garmise had stated that the deceased brandished a knife and frankly there was just no other version of what had occurred. The court also improperly applied the doctrine of circumstantial evidence as we have pointed out and as we shall point out hereinafter as well.

It has been said that a defendant in any criminal case is entitled to a fair trial. A fair trial "is a right admittedly protected by the due process clause of the Fourteenth Amendment." *(Adamson v. California,* 332 U.S. 46, 53, *reh. denied,* 332 U.S. 784, *ovrld. on other grounds, Malloy v. Hogan,* 378 U.S. 1.) Justice Frankfurter indicated that procedural due process requires a court to ascertain whether the proceedings "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even towards those charged with the most heinous offenses." *(Malinski v. New York,* 324 U.S. 401, 416 concurring)). Seven years later, now speaking for the Court, Justice Frankfurter again suggested the test. *(Rochin v. California,* 342 U.S. 165).

The Supreme Court has stated that "the community's sense of fair play and decency" must be respected. *(Rochin v. California, supra).* Words cannot do much more, according to Justice Frankfurter, in giving meaning to procedural due process. He observes:

> "Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'"

III.

Since the petitioner was threatened and assaulted in his own "home" by the deceased who brandished a knife, there was no duty to "retreat" and his use of force was justifiable. The tape was not "testimonial" evidence.

The State maintains that the killing herein was a premeditated murder. There are no facts contradicting the petitioner's version of what occurred.

The tape recording is *not sworn* testimony. It was declared not to be inconsistent with petitioner's version by Officer Carey, Sgt. Duckworth and Dr. Garrett in the inquest hearing.

The interpretation of the non-testimonial tape rests upon surmise at what actually occurred. In its opening, the State admitted that it could not explain the sequence of events that led to the shooting. There was no evidence from anyone, other than Garmise, as to in what order the shots were fired. The medical examiner said it could have been at little more than 12 inches.

A noise heard on the tape might have been a broom falling and not a shot at all. A discarded abortive statement found in petitioner's room was not inconsistent with his version that the shooting was in self-defense. It certainly did not indicate premeditated murder.

Even assuming that the deceased did not actually set his foot across the threshold of Garmise's room, a fact not established, this would still be tantamount to a threat in petitioner's own "residence." A person menacing Garmise in his own room, whether at the portal or with one foot across the threshold, is still an imminent threat to the dweller, who in this case is Garmise.

The trial judge merely recited abstract rules of criminal law. He did not marshall the evidence and did not explain to the veniremen that the petitioner's contention was that his life was being threatened in his own home. The trial judge should have explained that the room which Garmise occupied was his own "home" so far as the law was concerned. He had, therefore, no duty to retreat and could use force to repel an invader.

This distinction is clearly explained by the Supreme Court of Florida in *Hedges v. Florida,* 172 So. 2d 824, 827:

> "The quoted language placed upon the accused the duty to use all reasonable means consistent with her own safety to avoid the danger and avert the necessity of taking human life. To the lay mind this well could be construed to mean the duty to run or to get out of the way. There is no such duty when one is assaulted in his own home, despite the common law duty to 'retreat to the wall' when one is attacked elsewhere. Pell v. State, 97 Fla. 650, 122 So. 110. While Pell involved a trespasser, it clearly states the rule to be that when one is violently assaulted *in his own house or immediately surrounding premises, he is not obliged* to retreat but may stand his ground and use such force as prudence and caution would dictate as necessary to avoid death or great bodily harm. When in his home he has 'retreated to the wall.' Pell further decides that such an instruction should be an element of the charge on self-defense where the evidence supports it. Other courts have held that a man is under no duty to retreat when attacked in his own home. *His home is his ultimate sanctuary.* Wharton's Criminal Law and Procedure (Anderson), Vol. 1, p. 519; People v. Newcomer, 118 Cal. 263, 50 p. 405; State v. Grantham, 224

> S.C. 41, 77 S.E.2d 291; State v. Bissonnette, 83 Conn. 261, 76 A. 288. In view of the charge actually given, we find that the rule of non-necessity of retreat in one's own home should have been included.
>
> The petitioner will be entitled to a new trial." (Emphasis ours.) See also, *Pell v. State,* 97 Fla. 650, 122 So. 110 (1929).

A person assaulted in his own "home" or "immediately surrounding premises" (*Hedges v. State, supra*), may use such force as "may appear to him" to be necessary to save his own life or to save himself from great bodily harm. *Danford v. State,* 53 Fla. 4, 43 So. 593. The court below ignored the precedents of the State of Florida.

The charge of the trial court did not make this at all clear.

A.

The trial court's sterile recitation of abstract principles of law, without a meaningful attempt to apply them to the facts of this case or even to marshall the evidence and contentions of the parties made the charge insufficient and erroneous.

We have previously detailed the trial court's inadequate charge on circumstantial evidence. The court read abstract principles of law with virtually no effort to explain their significance to lay jurors.

To illustrate the absurdity and confusion of the charge, we call this Court's attention to page T714 where the trial court refers to a person in "lawful possession of a motor vehicle . . . ." What in the world does a motor vehicle have to do with this case?

The trial court never told the jury that if they find that Jones had menaced Garmise on the latter's own premises that there would be no duty to retreat and that Garmise could then use any force he felt necessary to repel an attack.

A judge, after all, is more than a mere automation and does not fulfil his role as the law-giver unless he does so in a meaningful manner, and relates his charge to the facts before the jury. Talking about a motor vehicle or abstractly about retreating is worthless.

The trial court was obliged to give a correct instruction on the law. It should have told the jury that they must not even consider the question of "retreating" if they found Garmise was in his own "home."

See *Hedges v. State, supra; Martin v. State,* App. 294 So. 2d 414.

In defining "expert witness," the trial court did not even make it clear who were to be regarded in that light. In discussing "statements" made out of court, the trial judge again gave a sterile charge, and did not even explain that the petitioner allegedly gave such statements (Fourteenth Amendment).

The trial court declined to give the requested charge on "intent" (T698; App. 26). The court's charge did not explain the difference between motive and intent. It did not explain "depraved mind" (T710). It did not explain "felony murder" (T710). It did not explain "culpable negligence" under the manslaughter charge (T710). (Cf. *Disney v. State,* 72 Fla. 492, 73 So. 598; *Russ v. State,* 140 Fla. 217, 191 So. 296).

The charges given must be applicable to the facts, so as to enable an intelligent understanding by the jury. Here the trial court just read a number of standard charges that a lawyer would have difficulty in understanding unless versed in criminal

law. (*Fleming v. State,* 155 Fla. 735, 21 So. 2d 345). While in *Fleming,* the court refused to give irrelevant charges, the case still is illustrative of the necessity to charge pertinently on the law as it applies to the facts. The charge herein was basically an amorphous glob of abstract legal principles which no jury could possible understand.

The trial court did not adequately explain premeditation. This was particularly prejudicial in the light of the court's refusal to charge the great weight had to be accorded to petitioner's version of the events. This is especially true when only circumstantial evidence is used to convict. (*Mayo v. State*).

The trial court did not explain "imminent danger" (T712).

"Imminent" as applied in this case did not mean "immediate," but rather mediate or close (*Scholl v. State,* 115 So. 43). In sum, therefore, the charge was useless and confusing and denied due process.

IV.

The prosecutor deliberately injected prejudicial error when he convinced the court over objection to allow four photos of the deceased into evidence merely to establish the conceded fact that Jones was shirtless. Three of these photos were highly inflammatory and one non-inflammatory picture could have been used, even if the concession was properly rejected.

A.

Error was also made in the unwarranted adversion by the prosecutor to petitioner's wealth, when no evidence thereof was adduced.

There were several photos taken of the deceased after he was shot. Neither his identity nor the cause of death was in dispute. What conceivable relevance the fact that he was

barechested could have is impossible to fathom. Since the prosecutor told the court it was pertinent, the defense conceded that Jones was shirtless. This, however, did not satisfy the State.

The defense then noted that one photo which was less inflammatory than the others could be introduced with the same effect and would not display the blood and gore of the other three. The trial court allowed all four in.

This was so prejudicial as to preclude a fair trial. The clothes worn by Jones, we urge, were irrelevant anyway.

In *Dyken v. State,* 89 So. 2d 866, the Supreme Court found that inflammatory pictures which need not have been used because of a concession of the defense constituted reversible error. See, too, *Beagles v. State,* 273 So. 2d 796, wher the court held that photos should be received with great caution when they depict gruesome or gory details. In the face of a concession by the defendant as to the cause of death, the court reversed. Similarly here, the fact that Jones was shirtless had nothing to do with the case. What difference if he wore striped pajamas or a tee shirt? No, the simple fact is that the prosecutor wanted to get the gory scene before the talismen and the trial court which was relatively inexperienced in these matters was hoodwinked into going along with the State. We would be most curious to find any cogent reason advanced by the respondent as to why more than one photo was needed to show that the deceased was shirtless.

See, *Saxon v. State,* App. 225 So. 2d 925; *Albritton v. State,* 221 So. 2d 192; *Young v. State,* 234 So. 2d 341; and *Wright v. State,* 250 So. 2d 333. See also, *Irvin v. Dowd,* 366 U.S. 717; *Rideau v. Louisiana,* 373 U.S. 723.

Since the life of a young man, the petitioner herein, lies in the balance, this error can hardly be described *de minimus.* Since the admission of the one, relatively non-inflammatory

picture would have accomplished the State's purpose, it was deliberately prejudicial to have permitted the other pictures into evidence and we maintain requires reversal. (*Sheppard v. Maxwell,* 384 U.S. 333, *Irvin v. Dowd, supra*).

B.

It was prejudicial to hurl a "harpoon" at the petitioner by asking whether he was wealthy — a "fact" never established by evidence. This was deliberate prejudice.

Mr. Orr, the prosecutor, asked the petitioner:

> "Q. As a matter of fact, your family is pretty wealthy, aren't they? A. I don't know how wealthy or poor they are.
>
> MR. PANZER: I object . . . what does that have to do with what happened on the 16th of October?"
>
> * * *
>
> "MR. ORR: I will withdraw it for the time being."

The issue of wealth or poverty was irrelevant to the issues in the case. The prosecutor, just as with the photos of the deceased was seeking to prejudice Garmise.

Mr. Orr's withdrawal of the line of questioning could not eradicate the prejudice. No jury can perform such mental gymnastics as to ignore such a "harpoon."

In *Gregory v. United States,* 369 F.2d 185 (D.C. Cir.) referring to *Krulewitch v. United States,* 336 U.S. 440, 453 the court explained:

> "The volunteering of inadmissible testimony prejudicial to the defendant has been condemned time and time again, by both state and federal courts. For example in Wright v. State, Okl. Cr. App. 325 P. 2d 1089, 1093 (1958), where a law enforcement officer injected this type of prejudicial testimony, not twice as here, but once, the court stated: 'This type of testimony has often been referred to as an "*evidential harpoon*" that has been wilfully jabbed into the defendant and then jerked out by an admonition to the jury not to consider same. This court has never condoned, but often criticized a witness being intoxicated with eagerness in an all out effort to obtain a conviction . . . . Officers must be aware that an overzealous attitude is, in most instances, detrimental to the prosecution and often results in a retrial of the case at considerable expense to the state.'" (Emphasis ours.)

Accord: *Watkins v. Simms,* 88 So. 765 where the court condemned introduction of arguments unsupported by evidence and calculated to cause the jury to lose sight of the true issues to the prejudice of the other party.

See, too, *Seaboard Airline-Railroad Co. v. Strickland,* 88 So. 2d 519; *Westbrook v. Bacskai,* 103 So. 2d 241; and *Tampa Transit Lines v. Corbin,* 62 So. 2d 10.

In *Tampa Transit Lines, supra,* this Court held:

> "Verdicts rendered by a jury, after having heard such incompetent testimony from an attorney and such highly prejudicial remarks, under the circumstances as shown by this case, cannot be permitted to stand."

See, too, *Kirk v. State,* 227 So. 2d 40 noting that the prosecutor in a criminal case has greater responsibility than counsel for an individual client, and must be scrupulously fair.

> ". . . His [the prosecutor's] duty is not to obtain convictions, but to see justice . . . . His case must *rest on evidence, not innuendo* . . . . Cases brought on behalf of the State of Florida should be conducted with a dignity worthy of the client." *Kirk v. State, supra.*

When the foregoing is viewed in connection with the unnecessary and prejudicial photos of the deceased, and the personal opinion voiced in the summation by the State, prejudice is clear.

In summation, Mr. Orr said, "I think you can believe Doug Hubbard." Adding later that his personal opinion was not controlling, did not eradicate the fact that the prosecutor lent his credibility to that of a State witness. (See, *People v. Carborano,* 301 N.Y. 39, 42, condemning the overall effect of prejudice which so blurs the issues as to preclude a fair trial.)

See *Poller v. Columbia Broadcasting System,* 368 U.S. 464, 473; *Sartor v. Arkansas Natural Gas Corp.,* 321 U.S. 620; and *United States v. Coplon,* 185 F.2d 629, 639.

CONCLUSION

The petition for certiorari should be granted. The Court should then reverse the determination of the District Court of Appeal for the Third District and upon doing so should vacate the judgment of conviction. In the alternative this Court should direct that the Supreme Court of the State of Florida hear the appeal on the merits.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

APPENDIX

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. A-893

LLOYD GARMISE,

Petitioner

V.

FLORIDA

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 28th, 1976.

s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 14th
day of April, 1976.

ORDER DENYING PETITION FOR REHEARING

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, 1976

TUESDAY, FEBRUARY 10, 1976

LLOYD GARMISE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 47,455

DCA 3 NO. 74-1134

On consideration of the Petition for Rehearing and/or in the Alternative Petition for Writ of Certiorari filed by appellant,

IT IS ORDERED that said petition is denied.

ADKINS, C.J., ROBERTS, ENGLAND, SUNDBERG AND HATCHETT, JJ., CONCUR

A True Copy

TEST:

s/ Sid J. White
Sid J. White
Clerk Supreme Court.

Order Denying Petition For Rehearing

Y
CC: Hon. W.P. Carter, Clerk
Hon. Richard Brinker, Clerk
Hon. Lewis B. Whitworth, Judge
Hon. Irving J. Whitman
Hon. Irving Anolik
Hon. Robert L. Shevin
Hon. Joel D. Rosenblatt
West Publishing Company

ORDER OF DISMISSAL

IN THE SUPREME COURT OF FLORIDA

JULY TERM, 1975

TUESDAY, DECEMBER 16, 1975

LLOYD GARMISE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 47,455

DCA No. 74-1134

DISTRICT COURT OF APPEAL, THIRD DISTRICT

Order of Dismissal

Upon consideration of the Motion to Dismiss filed by counsel for appellee, it is ordered by the Court that said motion is granted and this case be and is hereby dismissed.

ADKINS, C.J., ROBERTS, ENGLAND, SUNDBERG AND HATCHETT, JJ., CONCUR

A True Copy

TEST:

s/ Sid J. White
Sid J. White
Clerk Supreme Court of Florida.

Y
CC: Hon. W.P. Carter, Clerk
Hon. Richard Brinker, Clerk
Hon. Lewis B. Whitworth, Judge

Whitman & Wolfe

Hon. Irving Anolik
Hon. Irving Anolik
Hon. George Georgieff
Hon. Joel D. Rosenblatt

OPINION OF DISTRICT COURT OF APPEAL OF FLORIDA — THIRD DISTRICT

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1975

LLOYD GARMISE,

Appellant,

vs.

THE STATE OF FLORDIA,

Appellee.

CASE NO. 74-1134

Opinion filed April 8, 1975.

An Appeal from the Circuit Court for Dade County, Lewis B. Whitworth, Judge.

Whitman & Wolfe, for appellant.

Robert L. Shevin, Attorney General, and Joel D. Rosenblatt, Assistant Attorney General, for appellee.

Before PEARSON and NATHAN, JJ. and CHARLES CARROLL (Ret.), Associate Judge.

PER CURIAM.

The defendant, Lloyd Garmise, seeks review of a conviction for first degree murder and sentence entered pursuant to a jury verdict and upon an information charging same.

The defendant presents several points on appeal for our consideration. First, he contends that the court erred in denying his motion for a directed verdict of acquittal at the conclusion of all of the evidence. We note at the outset that the defendant is not challenging the weight and sufficiency of the evidence as to the jury verdict. When a defendant moves for a directed verdict of acquittal, he admits all facts in evidence adduced and every conclusion favorable to the State fairly and reasonably inferable therefrom. Lett v. State, Fla. App. 1965, 174 So.2d 568, 569; Devlin v. State, Fla. App. 1965, 175 So.2d 82. A motion for judgment of acquittal should not be granted unless it is apparent that no legally sufficient evidence has been submitted upon which the jury could legally find a verdict of guilty. Shifrin v. State, Fla. App. 1968, 210 So.2d 18. See also, Holland v. State, 1937, 129 Fla. 363, 176 So. 169; Adams v. State, 1939, 138 Fla. 206, 189 So. 392. We find that there was substantial and sufficient competent evidence presented to support the denial by the trial court of the defendant's motion for acquittal.

The defendant's second point is that the court erred in admitting into evidence a number of color photographs of the body of the deceased which, the defendant argues, were inflamatory, highly prejudicial and of no probative value. As a general rule, the admissibility of photographic evidence is within the broad discretion of the trial judge. The discretion will not be disturbed by an appellate court unless clearly abusive or patently in error. Reed v. State, Fla. App. 1969, 224 So.2d 364. Photographs taken at the scene of the crime are admissible in evidence if they tend to illustrate or explain the testimony of a witness[1] or may be of assistance to the jury in understanding the

1. See Pressley v. State, Fla. App. 1972, 261 So.2d 522, citing Kitchen v. State, Fla. 1956, 89 So.2d 667 and Grant v. State, Fla. 1965, 171 So.2d 361.

testimony. Belger v. State, Fla. App. 1965, 171 So.2d 574. The ultimate test in judging admissibility is one of relevancy. Wilkins v. State, Fla. 1963, 155 So.2d 129. ". . . (W)hen photographs are otherwise relevant they will not be held incompetent merely because they tend to prejudice the jury. Leach v. State, Fla. 1961, 132 So.2d 329, 331. In the instant case the photographs were relevant for the jury's consideration and hence, admissible.

The third point raised by the defendant is that the court erred in denying the defendant's requested jury instructions regarding the weight to be given defendant's own testimony as to self defense. The defendant requested the following charge:

> "If the only version of the manner in which the incident occurred is the version given by the Defendant, then the Jury must accept the Defendant's version and give great weight to it. This is especially so if there is no evidence to contradict the Defendant's evidence."

There is no error in refusing an instruction which implies and is calculated to impress the jury with the view that there is no testimony as to a certain phase of the case, when the record shows that there was such testimony. Barker v. State, 1898, 40 Fla. 178, 24 So. 69. In the instant case there was such evidence, albeit mainly circumstantial. Incomplete and/or misleading instructions are properly denied. Wells v. State, Fla. App. 1972, 270 So.2d 399; Kinchen v. State, Fla. App. 1974, 297 So.2d 341. The requested instruction, being an inaccurate statement of the law, was properly denied.

The remaining points raised by the defendant are without merit. Therefore, no reversible error having been shown, the conviction and sentence appealed are hereby affirmed.